(2)

No. 90-143

In The

Supreme Court of the United States

STATE OF CONNECTICUT
JOHN F. DI GIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly ruled that a state court defendant is deprived of due process when his real estate is attached *ex parte* (without prior notice and opportunity to be heard), when there are no extraordinary circumstances requiring special protection to a state or creditor interest, and without the safeguard of a bond to protect against wrongful attachment, pursuant to the established state procedure of Conn. Gen. Stat. §52-278e(a)(1).

REASONS FOR NOT GRANTING THE WRIT

I. THE CASE IS INSIGNIFICANT

This case does not raise an issue of general importance because (a) the challenged subsection of Connecticut's prejudgment remedy statute is peculiar to Connecticut; and (b) the right to notice and an opportunity to be heard before deprivation of a property interest, in the absence of exigent circumstances, is indisputable.

Connecticut's statute is unique in allowing a prejudgment attachment without prior notice and opportunity to be heard, solely because the defendant owns real estate. Subsection 52-278e(a)(1) does not require a showing that the plaintiff has a preexisting interest in the property (lis pendens, mechanic's lien, or security interest), or that there are extraordinary circumstances which justify dispensing with advance notice (need to obtain in rem jurisdiction; fraudulent transfer).

Connecticut's peculiar provision raises only a local question, not one of general importance. The provision is also contrary to the unanimous and longstanding position of this Court, that when a deprivation is foreseeable, and it is possible to provide prior notice and hearing, the State must do so. E.g., *Zinermon v. Burch*, 110 S.Ct. 975, 990 (majority), 995-96 (dissent) (1990); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Parratt v. Taylor*, 451 U.S. 527, 537-38 (1981); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 and note 7 (1972).

The decision below is thus sound and unexceptionable. It breaks no new ground which this Court need address.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Petitioners claim that decisions of the Third, Fourth (three judge district court), Fifth and Ninth Circuit Courts of Appeals conflict with the decision below. On the contrary, those courts all agree with the court below, that where a foreseeable deprivation occurs pursuant to an established state procedure, a predeprivation hearing is the norm. E.g., *Hicks v. Feeney*, 850 F.2d 152, 154 (3d Cir. 1988); *Fields v. Durham*, 856 F.2d 655, 657 (4th Cir. 1988), vacated on other grounds and remanded in light of *Zinermon*, 58 U.S. L. Week 3564 (1990); *Turner v. Colonial Finance Corp.*, 467 F.2d 202 (5th Cir. 1972) (invalidating a replevin statute because it did not provide for advance notice/opportunity to be heard); *Haygood v. Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985) (en banc), cert. den. 478 U.S. 1020 (1986); *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1380-82 (9th Cir. 1989).

The earlier cases cited by petitioners do not conflict with the decision below; those cases concern significantly different statutes which have the protections found lacking in Connecticut's.

For instance, *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), concerns a statute unlike Connecticut's. The Washington statute minimized the risk of wrongful attachment by requiring the attaching plaintiff to post a double bond, Wash. Rev. Code (former) § 7.12.060; (current) ch. 6.25; and allowed an *ex parte*

attachment only in extraordinary circumstances. V Martindale-Hubbell Law Directory 1973, Wash. Law Digest *Attachments*; VI *Id.* 1975; VIII *Id.* 1989.

In 1975, the Ninth Circuit based its *Chehalis* ruling on a perception that a real estate attachment does not deprive the defendant of a constitutionally protected interest. Contra, *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988); Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). The Ninth Circuit no longer adheres to that early view. Cf. *Stone v. Godbehere*, 894 F.2d 1131, 1134 (9th Cir. 1990) ("A restraining order prohibiting the alienation of property does impose a significant injury.").

Hutchinson v. Bank of North Carolina, 392 F.Supp. 888 (M.D.N.C. 1975), considered a statute which, unlike Connecticut's, allowed *ex parte* attachments only in extraordinary circumstances, and required a plaintiff's bond. The three-judge court emphasized that the constitutionality of the statute was based on its limit to narrow and exceptional circumstances. *Hutchinson* does not conflict with the decision below.

Similarly, *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3d Cir. 1976), is consistent with the decision below. The court invalidated a statute which allowed an *ex parte* attachment only in extraordinary circumstances: against a nonresident, for jurisdictional purposes. The court, at p. 1130, noted the centrality of the bond requirement to a constitutionally valid statute.

Finally, petitioners cite dicta in a footnote of *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978). That case held an *ex parte* prejudgment attachment statute

unconstitutional even though it was limited to extraordinary circumstances and required a bond, again, unlike the Connecticut provision at issue.

None of the cases cited by petitioners as conflicting with the decision below considered a statute like Connecticut's, which does not limit *ex parte* attachments to extraordinary circumstances and which does not mandate a bond to protect the defendant. The cases do not conflict with the decision below; they are consistent with it.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE CONNECTICUT SUPREME COURT

The Connecticut Supreme Court has never considered whether the subsection at issue violates due process. Accordingly, the decision of the Second Circuit Court of Appeals does not conflict with any decision of the Connecticut Supreme Court.

In *Fermont Division v. Smith*, 178 Conn. 393, 395 (1975), the court had a different subsection before it, § 52-278e(a)(2), which requires an allegation of extraordinary circumstances for an *ex parte* attachment. In *Kukanskis v. Griffith*, 180 Conn. 501 (1980), the court held that an *ex parte* release of an e(a)(1) attachment was harmless error because the original *ex parte* attachment had been improperly based on a conclusory affidavit.

One cannot, as do petitioners, presume that the Connecticut Supreme Court decided issues raised herein, but not raised or involved in the cases cited by petitioners. Cf. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

In *Kukanskis, supra*, at 509, the Connecticut Supreme court recognized the absence of a bond as a due process defect, as it also did in *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 385 (1975), thus agreeing with the majority opinion below.

Both *Kukanskis* and *Roundhouse* recognized the property owner's right to be heard at a meaningful time and in a meaningful manner. The analysis of the Connecticut Supreme Court in those decisions suggests that, if it were to decide the same issues as decided by the court below, it would reach the same result.

Since the Connecticut Supreme Court has not addressed or decided the issue before the Second Circuit, there can be no conflict.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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